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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 THERESA M. WEESNER,  
8 Plaintiff,

Case No. 2:16-cv-02018-RFB-PAL

ORDER

9 v.

10 NANCY A. BERRYHILL, Acting  
11 Commissioner of Social Security,<sup>1</sup>  
12 Defendants.

13 **I. INTRODUCTION**

14 Before the Court is Plaintiff Theresa M. Weesner's ("Weesner") Motion for Reversal and  
15 Remand, ECF No. 14, and Defendant Nancy A. Berryhill's ("Commissioner") Motion to Affirm,  
16 ECF No. 22.

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18 **II. BACKGROUND**

19 Weesner applied for social security benefits and supplemental security income in late 2012,  
20 alleging the following disabling impairments as of June 30, 2011: degenerative joint disease of  
21 both hips, degenerative disc disease, osteoarthritis, asthma, obesity, major depressive disorder,  
22 generalized anxiety disorder, and pain disorder. AR 85–103, 158–79, 336. The Social Security  
23 Administration (the "Administration") found Weesner was not disabled under the Social Security  
24 Act ("Act") and therefore denied Weesner's applications on April 30, 2013 and again upon  
25 reconsideration on September 4, 2013. AR 85–89, 99–103.

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28 <sup>1</sup> Nancy A. Berryhill, as successor to Carolyn W. Colvin, is automatically substituted as Defendant in this matter under Federal Rule of Civil Procedure 25(d).

1 Weesner opposed the Administration's denials and requested a hearing regarding her  
2 applications. AR 105, 113, 134. An administrative law judge ("ALJ"), Eileen Burlison, conducted  
3 a hearing on October 21, 2014, at which Weesner was represented by counsel. AR 46–76. Both  
4 Weesner and a vocational expert testified at the hearing. See id.

5 On January 30, 2015, the ALJ then denied Weesner's applications via a written decision.  
6 AR 23–45. The ALJ determined Weesner suffered from several severe physical impairments,  
7 including bilateral hip degenerative joint disease, avascular necrosis, degenerative disc disease,  
8 osteoarthritis, asthma, and obesity. AR 29. The ALJ, however, found that Weesner's other alleged  
9 impairments, including her mental health impairments, were not severe under the Act. AR 29–30.

10 The ALJ then determined Weesner's residual functional capacity ("RFC").<sup>2</sup> AR 31. In  
11 determining Weesner's RFC, the ALJ rejected Weesner's subjective complaints about the  
12 intensity, persistence, and limiting effects of the pain, stating that: "[t]he objective medical  
13 evidence ... shows that [Weesner] has some limitations in her functional abilities" but the  
14 functional limitations were not "as severe as [Weesner] alleged." AR 33. Importantly, the ALJ  
15 did not issue a finding of malingering. See id. The ALJ instead provided three reasons for her  
16 determination. AR 33–35. First, the ALJ found the objective medical evidence did not support  
17 the alleged extent of Weesner's limitations. Id. Second, the ALJ found that Weesner's daily  
18 activities contradicted the extent of the limitations alleged, specifically emphasizing: Weesner's  
19 role as guardian to her two grandchildren (one of which suffers from fetal alcohol syndrome); her  
20 ability to perform chores; her continual attendance at church services; and her ability to work  
21 occasionally as a substitute teacher for some time after the alleged onset date of the disabling  
22 impairments. AR at 35. However, the ALJ previously found that Weesner had not engaged in  
23 substantial gainful activity since the alleged onset date. AR 28. Third, the ALJ considered specific  
24 medical opinions, assigning the greatest weight to that of a consulting Administration physician  
25 and two reviewing Administration physicians. Id. The ALJ finally discounted the statements of  
26 two lay witnesses, describing their testimony as influenced by their friendship with Weesner and

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28 <sup>2</sup> RFC is defined as the most an individual is capable of doing in a work setting despite the  
individual's impairments and related symptoms, such as pain. 20 C.F.R. § 416.945(a)(1).

1 indicating it largely reflected the same allegations made by Weesner. AR 36. Based on the  
2 foregoing, the ALJ determined that Weesner could perform light work as defined in 20 C.F.R. §  
3 404.1567(b) and 416.967(b), “except [Weesner] can occasionally perform postural adjustments[]  
4 and should avoid hazards including working at heights or around dangerous moving machinery.”

5 With Weesner’s RFC determined, the ALJ found that Weesner could perform her past  
6 relevant work as an elementary teacher or other occupations to which Weesner’s skills were  
7 transferrable, *e.g.*, a receptionist. AR 37. The ALJ therefore concluded that Weesner was not  
8 disabled under the Act. AR 38.

9 Weesner appealed the ALJ’s decision to the Administration’s Appeals Council. AR 1, 5.  
10 The Appeals Council denied Weesner’s request for review on June 27, 2016, making the ALJ’s  
11 decision final. *Id.* Weesner filed this action on August 25, 2016 to challenge the decision. ECF  
12 No. 1.

### 13 14 **III. LEGAL STANDARD**

15 42 U.S.C. § 405(g) provides for judicial review of the Commissioner’s disability  
16 determinations and authorizes district courts to enter “a judgment affirming, modifying, or  
17 reversing the decision of the Commissioner of Social Security, with or without remanding the  
18 cause for a rehearing.” In undertaking that review, an ALJ’s “disability determination should be  
19 upheld unless it contains legal error or is not supported by substantial evidence.” *Garrison v.*  
20 *Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (citation omitted). “Substantial evidence means more  
21 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable  
22 person might accept as adequate to support a conclusion.” *Id.* (quoting *Lingenfelter v. Astrue*, 504  
23 F.3d 1028, 1035 (9th Cir. 2007)) (quotation marks omitted).

24 “If the evidence can reasonably support either affirming or reversing a decision, [a  
25 reviewing court] may not substitute [its] judgment for that of the Commissioner.” *Lingenfelter*,  
26 504 F.3d at 1035. Nevertheless, the Court may not simply affirm by selecting a subset of the  
27 evidence supporting the ALJ’s conclusion, nor can the Court affirm on a ground on which the ALJ  
28 did not rely. *Garrison*, 759 F.3d at 1009-10. Rather, the Court must “review the administrative

1 record as a whole, weighing both the evidence that supports and that which detracts from the ALJ's  
2 conclusion,” to determine whether that conclusion is supported by substantial evidence. Andrews  
3 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

4 The Social Security Act has established a five-step sequential evaluation procedure for  
5 determining Social Security disability claims. See 20 C.F.R. § 404.1520(a)(4); Garrison, 759 F.3d  
6 995, 1010 (9th Cir. 2014). “The burden of proof is on the claimant at steps one through four, but  
7 shifts to the Commissioner at step five.” Id. at 1011. At step four, the ALJ considers the  
8 assessment of the claimant's RFC as well as the claimant's capability of performing past relevant  
9 work. Id. If the claimant is incapable of performing past relevant work, the ALJ determines  
10 whether the claimant can make an adjustment to substantial gainful work other than his past  
11 relevant work in step five. 20 C.F.R. § 404.1520(g).

#### 12 13 **IV. DISCUSSION**

14 Weesner challenges the ALJ's decision on four grounds: (1) improperly finding Weesner's  
15 alleged mental impairments were not severe; (2) improperly discrediting Weesner's subjective  
16 complaints of her pain; (3) failing to sufficiently address lay witness testimony; and (4) rendering  
17 decisions at step four and step five of the disability evaluation process that were not supported by  
18 substantial evidence. The Court finds that remand is warranted on ground two and ground three.

##### 19 **A. Credibility of Weesner and Lay Witnesses**

20 To determine the credibility of a claimant's testimony, an ALJ engages in a two-step  
21 analysis. Garrison, 759 F.3d at 1014–15. First, the claimant must have presented objective  
22 medical evidence of an underlying impairment “which could reasonably be expected to produce  
23 the pain or other symptoms alleged.” Lingenfelter, 504 F.3d at 1035–36 (quoting Bunnell v.  
24 Sullivan, 947 F.2d 341, 344 (9th Cir. 1991). The claimant does not need to produce evidence of  
25 the symptoms alleged or their severity, but she must show the impairments could reasonably cause  
26 some degree of the symptoms. Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996).

27 Second, the ALJ determines the credibility of the claimant's testimony regarding the  
28 severity of her symptoms. Garrison at 1014–15. Unless affirmative evidence supports a finding

1 of malingering, the ALJ may only reject the claimant's testimony by providing "specific findings  
2 as to credibility and stating clear and convincing reasons for each." Robbins v. Soc. Sec. Admin.,  
3 466 F.3d 880, 883 (9th Cir. 2006). "[S]ubjective pain testimony cannot be rejected on the sole  
4 ground that it is not fully corroborated by objective medical evidence," however objective medical  
5 evidence, evidence of conservative treatment, and contradictions found by considering the  
6 claimants daily activities are relevant factors in determining the severity of the claimant's pain and  
7 its disabling effects. Rollins v. Massanari, 261 F. 3d 853, 856–57 (9th Cir. 2001). But "[m]any  
8 home activities are not easily transferable to what may be the more grueling environment of the  
9 workplace, where it might be impossible to periodically rest or take medication." Fair v. Bowen,  
10 885 F.2d 597, 603 (9th Cir. 1989). "[C]laimants should not be penalized for attempting to lead  
11 normal lives in the face of their limitations." Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).

12 Here, the ALJ recognized that the objective medical evidence supported a finding of  
13 impairments that could reasonably be expected to cause Weesner's pain or other alleged  
14 symptoms. But the ALJ then determined that Weesner's subjective complaints were unsupported  
15 by the objective medical evidence, including some conservative treatments, as well as Weesner's  
16 daily activities. The Court finds the ALJ erred.

17 The ALJ erred in concluding that the objective medical evidence showed that Weesner's  
18 subjective complaints of her pain were not credible. While the ALJ referenced evidence of "severe  
19 degenerative disc disease" and recommendations for hip replacements, the ALJ relied heavily on  
20 evidence suggesting "normal" physical examinations, conservative treatment, and physicians'  
21 reports lacking any notation of functional limitations. Cherry picking of an administrative record  
22 is impermissible. Garrison, 759 F.3d at 1017 n. 23; see also Ghanim v. Colvin, 763 F.3d 1154,  
23 1164 (9th Cir. 2014); Trevizo v. Berryhill, 871 F.3d 664, 679 (9th Cir. 2017). Further, the ALJ  
24 relied on the earlier opinions of consulting and examining Administrative physicians rather than  
25 the more recent opinions from treating physicians. Compare AR 527–35, 560–73, 601–17 with  
26 AR 667–79. The ALJ relied on the earlier opinions of non-treating physicians despite the later  
27 medical records indicating Weesner's degenerative impairments were worsening over time—as

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1 degenerative conditions do. AR 667. The ALJ failed to explain why the later objective findings  
2 could not support the degree of pain and limitations alleged by Plaintiff.

3 The ALJ also erred in determining that Weesner's daily activities demonstrated Weesner's  
4 functional limitations were not as severe as Weesner alleged. In her hearing testimony and in the  
5 function report, Weesner acknowledged that she could perform certain chores, care for her  
6 grandchildren, attend church, and sporadically work as a substitute teacher. The ALJ relies heavily  
7 on Weesner's admission. But in the same testimony and function report—indeed often in the same  
8 sentences—Weesner qualified her abilities with limitations.

9 For example, Weesner testified that she could perform chores like cooking or washing  
10 dishes *as long as* she had a stool to support her standing; she could shop for groceries *as long as*  
11 she went to a smaller store so that she could make it a quick trip; she could drive *but* she had  
12 difficulty getting in and out of a car because of pain; and, she could act as the guardian for her  
13 grandchildren *but* they helped care for her in many ways, such as assisting her in putting on shoes  
14 or completing the grocery shopping. AR 53–54, 57, 63 – 64, 291–98. The ALJ improperly  
15 accepted the portions of Weesner's testimony indicating capabilities while rejecting the portions  
16 indicating limitations. Again, cherry-picking of the record is not permissible. Garrison, 759 F.3d  
17 at 1017 n. 23; see also Ghanim, 763 F.3d at 1164; Trevizo, 871 F.3d at 679.

18 Further, “ALJs must be especially cautious in concluding that daily activities are  
19 inconsistent with testimony about pain, because impairments that would unquestionably preclude  
20 work and all the pressures of a workplace environment will often be consistent with doing more  
21 than merely resting in bed all day.” Garrison, 759 F.3d at 1016. The ALJ failed to specifically,  
22 clearly, and convincingly explain why Weesner's activities are consistent with an ability to  
23 function in a full-time workplace environment.

24 As a final issue, the ALJ discredited the two lay witnesses' testimony because the  
25 allegations were redundant to Weesner's allegations and the witnesses were friends with Weesner.  
26 While the ALJ could properly reject the lay witnesses' testimony on the same grounds as those  
27 offered to reject Weesner's testimony if the offered grounds were well supported, Molina v.  
28 Astrue, 674 F.3d 1104, 1117 (9th Cir. 2012), the Court has determined the ALJ did not adequately

1 support her reasoning for finding Weesner not credible. Thus, the Court also finds the ALJ erred  
2 in concluding the lay witnesses' testimony was not credible.

### 3 **B. Additional Administrative Proceedings**

4 Having founds that the ALJ erred in its disability determination, the Court next considers  
5 whether to remand for additional proceedings or for an award of benefits. "[T]he proper course,  
6 except in rare circumstances, is to remand to the agency for additional investigation or  
7 explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (quoting I.N.S. v. Orlando  
8 Ventura, 537 U.S. 12, 16 (2002)). The Court "can order the agency to provide the relief it denied  
9 only in the unusual case in which the underlying facts and law are such that the agency has no  
10 discretion to act in any manner other than to award or to deny benefits." Treichler v. Comm'r of  
11 Soc. Sec. Admin., 775 F.3d 1090, 1102 n.6 (9th Cir. 2014) (citation omitted). The Court considers  
12 whether the record is fully developed, whether there are outstanding issues that must be resolved  
13 before a disability determination can be made, and whether further administration proceedings  
14 would be useful. Id. at 1101. "Where there is conflicting evidence, and not all essential factual  
15 issues have been resolved, a remand for an award of benefits is inappropriate." Id. Remand is  
16 "required to allow an agency to consider in the first instance an issue that it ha[s] not previously  
17 addressed." Benecke, 379 F.3d at 595 (9th Cir. 2004).

18 Here, the ALJ did not consider Weesner's subjective complaints of pain or the  
19 substantiating testimony from the lay witnesses when determining Weesner's RFC. The ALJ is  
20 thus instructed to credit Weesner's testimony regarding her pain and limitations and to reconsider  
21 the lay witnesses' testimony in light of this order on remand and to recalculate the appropriate  
22 RFC before proceeding to step four and step five of the disability evaluation process.

### 23 **V. CONCLUSION**

24 **IT IS ORDERED** that Weesner's Motion for Reversal and Remand (ECF No. 14) is  
25 GRANTED and that Defendant's Cross-Motion to Affirm (ECF No. 22) is DENIED.

26 **IT IS FURTHER ORDERED** that the decision of the ALJ Is VACATED and the case is  
27 REMANDED to the Agency for further administrative proceedings. The ALJ is instructed to  
28 credit Weesner's testimony regarding her pain and limitations, to reconsider and reject only on

1 specified grounds the testimony of the two lay witnesses that substantiate Weesner's subjective  
2 claims, and to reconsider the sequence of the objective medical evidence when evaluating  
3 Weesner's RFC.

4 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter a final judgment in  
5 favor of Weesner and against the Commissioner. The Clerk of Court is instructed to close the case  
6 accordingly.

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8 **DATED:** November 23, 2018.

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**RICHARD F. BOULWARE, II**  
**UNITED STATES DISTRICT JUDGE**